

BILL ANALYSIS

C.S.H.B. 3009
By: Capelo
Public Health
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Following an interim study by an ad hoc coalition representing a broad spectrum of health care organizations, interested experts on "end-of-life issues," and legislative and executive branch advisors and monitors, the 1999 76th Texas Legislature enacted Senate Bill 1260, the "Advance Directives Act." The same coalition had previously worked on various "end-of-life" issues since 1994.

The Act established a new Chapter 166 of the Health and Safety Code to bring together in a single statute two separate chapters of the Health and Safety Code and one chapter of the Civil Practices and Remedies Code. The Act substantially revised the prior statutes relating to "Directives to Physicians" (also known as the "Living Will") and the "Durable Power of Attorney for Health Care," and renamed the related documents the "Directive to Physicians and Family" and "Medical Power of Attorney," respectively. The Act revised all three former statutes to provide consistent definitions and procedural provisions governing the three legal documents and made them more "user friendly."

The United States Supreme Court has held that individuals have a constitutional right to consent or refuse to consent to medical treatment. The Act provides three different documents by which a person may make his or her wishes regarding medical treatment which the person wishes to continue or have withheld or withdrawn in certain circumstances at some time in the future when he or she cannot make health care treatment decisions for himself or herself or communicate those decisions to another. The "Directive to Physicians and Family" provides a means by which a person may give clear and specific directions to physicians, health care providers and family members regarding the medical treatment he or she wishes to receive or have withheld or withdrawn. The "Medical Power of Attorney" also permits a person to express his or her wishes regarding future medical treatment but also permit the person to appoint a surrogate decisionmaker to make health care treatment decisions in accordance with his or her stated wishes when the person can no longer do so. The revised "Out-of-Hospital Do-Not-Resuscitate Order" is a narrowly-focused document created for the sole purpose of overriding the standard duty of EMS personnel to initiate resuscitation of any person they find in arrest, as may be appropriate for a terminally-ill hospice patient who arrests outside of a hospital setting, such as in a nursing home or in his or her own home.

The Act established several landmark provisions which have been followed by many states across the nation, among them: (1) provisions which make the individual's wishes regarding end-of-life medical treatment decisions binding on health care professionals and enforceable for the first time; (2) clear authority and a simple means by which a person may effectively express for a patient his or her wishes either to have life-sustaining treatment withheld or withdrawn or to have it continued, in the event he or she arrests; and (3) provisions providing transfer procedures and for an ethics review process to resolve conflicts when a patient or his/her surrogate decisionmaker and the treating physician do not agree regarding the continuation or withholding or withdrawal of life-sustaining treatment.

After almost four years of experience under the new Act, the same ad hoc coalition attempted to identify and resolve problems that had arisen under the new Act. The coalition proposes changes to address the following concerns: (1) the duty of health care professional to withhold or withdraw CPR from, or provide it to a person who has a terminal or irreversible medical condition, who arrests and whose death is reasonably expected to occur within minutes to hours regardless of the provision of resuscitation; (2) the applicability of the transfer and ethics committee review processes when the treating physician and the patient's surrogate decisionmaker disagree regarding the withholding, withdrawal, or continuation of life-sustaining treatment in pediatric cases; (3) the applicability of the transfer and ethics committee review processes to patients for whom the determination that continued life-sustaining treatment is inappropriate

has been made, who are transferred to another facility, and who then return to the facility where the determination had been previously made within a short period of time; (4) the advisability or need for additional written notice to patients or their surrogate decisionmakers about the transfer and ethics committee review procedures and the potential availability of assistance in the transfer process in those circumstances in which there is a disagreement between the treating physician and the patient or his/her surrogate decisionmaker regarding the withholding or withdrawal or continuation of life sustaining treatment; and (6) the need to clarify that a physician's "do-not-resuscitate order" may be honored by health care personnel other than EMS personnel in out-of-hospital settings and that only the official state "Out-of-Hospital Do-Not-Resuscitate Order" will override the duty of EMS personnel to resuscitate in out-of-hospital settings.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

SECTION 1. The "definitions" section of the "general provisions" subchapter (Subchapter A) of the "Advance Directives Act," Chapter 166, Health and Safety Code, is amended by amending the definition of the term "health care or treatment decision" to clarify that the Act applies to minors as well as adults in accordance with the Texas Family Code and the federal law and regulations relating to child abuse and neglect to the extent they are applicable on the basis of the State's receipt of federal funds. The latter phrase is added to clarify that this change is not intended to and does not alter the status quo regarding the applicability of the state or federal law.

SECTION 2. The subchapter of the Act relating to "Directives to Physicians and Family" (Subchapter B) is amended by amending Section 166.046 by:

(1) adding the words "OR TREATMENT DECISION" to its heading to conform the heading more accurately to the content of the section;

(2) by adding the words "health care or" to the words "treatment decision" in subsection (a) to more properly refer to the term defined in the Act and inserting the words "made by or on behalf of a patient" and deleting the reference to Section 166.039 to clarify that the Act applies to minors as well as adults;

(3) by inserting a new subdivision (2) in subsection (b) to require that, at the time a patient or the patient's surrogate decisionmaker is informed of the procedure governing review of a physician's refusal to honor the patient's advance directive or treatment decision, or that of his/her surrogate decisionmaker, he/she must also be provided copies of the appropriate statement providing information about the ethics committee review process and the registry of health care providers and referral groups that have indicated a willingness to assist the patient or surrogate decisionmaker in locating and transferring the patient to a physician or facility willing to honor that treatment decision;

(4) by inserting the words "or the person responsible for the health care decisions of the patient" in subsection (e) to conform to the subchapter provisions relating to the authority of a surrogate decisionmaker to make health care treatment decisions for the patient and by inserting the words "has decided" and "has affirmed" to improve the syntax of the sentence;

(5) by inserting a new subsection (f) to provide immunity from civil or criminal liability in those rare circumstances in which a physician, nurse or other person acting under a physician's direction participates in stopping or withholding cardiopulmonary resuscitation from a patient who has a terminal or irreversible condition, who has arrested and who, in reasonable medical judgment, will die within minutes or hours, regardless of resuscitation; and

(6) by inserting a new subsection (g), and renumbering the remaining subsections accordingly, to

provide that, when the ethics committee review process had been completed for a patient for whom the determination has been made that continuation of life-sustaining treatment is inappropriate, and the patient had been transferred to another facility but has returned to the same facility within six months of the decision and review process, a subsequent ethics committee review process is not necessary to comply with the provisions of the Act.

SECTION 3. The subchapter of the Act relating to “Directives to Physicians and Family” is amended by adding a new Section 166.052 to set forth two alternative standard forms to be provided to patients or their surrogate decisionmakers upon request, which inform them of the applicable procedures in those circumstances in which there is a disagreement regarding the continuation of life-sustaining treatment, in both those circumstances in which the physician recommends against life-sustaining treatment that the patient wishes to continue and when the physician recommends the continuation of life-sustaining treatment that the patient does not wish to continue.

SECTION 4. The subchapter of the Act relating to “Directives to Physicians and Family” is amended by adding a new Section 166.053 to establish a voluntary registry to be maintained within the Texas Health Care Information Council to provide the identity and contact information of health care providers and referral groups indicating their willingness to accept or assist in the transfer of a patient to a physician or facility that will honor a patient’s advance directive or health care treatment decision, with the registry to be posted on the Council’s Website accompanied by a disclaimer that neither the Council nor the State endorses or assumes any responsibility for any representation, claim, or act of any of the listed providers or referral groups.

SECTION 5. The subchapter of the Act relating to “Out-of-Hospital Do-Not-Resuscitate Orders” (Subchapter C) is amended to clarify that health care professionals may honor a physician’s “do-not-resuscitate” order in an out-of-hospital setting, such as a nursing facility or hospice in-patient facility, but that emergency medical services personnel may honor only a properly completed, state “Out-of-Hospital Do-Not Resuscitate Order” in accordance with the Act.

SECTION 9. Effective Date. The Act will take immediate effect if it receives a two-thirds vote of all members of each house of the legislature or is otherwise to be effective September 1, 2003.

EFFECTIVE DATE

Upon passage, or, if the Act does not receive the necessary vote, the Act take effect September 1, 2003.

COMPARISON OF ORIGINAL TO SUBSTITUTE

SECTION 1. The “definitions” section of the “general provisions” subchapter (Subchapter A) of the “Advance Directives Act,” Chapter 166, Health and Safety Code, is amended to:

(1) amend the definition of the term “health care or treatment decision” to clarify that the Act applies to minors as well as adults; and

(2) add the definition of the term “cardiopulmonary resuscitation” from the “definitions” section of the Out-of-Hospital Do-Not-Resuscitate Order subchapter (Subchapter C) in order to apply the definition to the entire Act.

SECTION 2. The subchapter of the Act relating to “Directives to Physicians and Family” (Subchapter B) is amended by adding a new Section 166.010 to clarify that the application of the Act to minors is not intended to and does not otherwise affect the applicability of the relevant provisions of the Texas Family Code and the federal law and regulations relating to child abuse and neglect based upon the State’s receipt of federal funds. The latter phrase is added to clarify that this changes is not intended to and does not alter the status quo regarding the applicability of the state or federal law.

SECTION 3. The subchapter of the Act relating to “Directives to Physicians and Family” is amended by adding a new subsection (e) to Section 166.044 to provide immunity from civil or criminal liability in those rare circumstances in which a physician, nurse or other person acting under a physician’s direction participates in stopping or withholding cardiopulmonary resuscitation from a patient who has a terminal or

irreversible condition, who has arrested and who, in reasonable medical judgment, will die within minutes or hours, regardless of resuscitation.

SECTION 4. The subchapter of the Act relating to “Directives to Physicians and Family” is amended by adding the words “OR TREATMENT DECISION” to the heading of Section 166.046 of the Act to conform more accurately to the content of the section.

SECTION 5. The subchapter of the Act relating to “Directives to Physicians and Family” is amended by amending Section 166.046:

(1) by adding the words “health care or” to the words “treatment decision” in subsection (a) to more properly refer to the term defined in the Act and inserting the words “made by or on behalf of a patient” and deleting the reference to Section 166.039 to clarify that the Act applies to minors as well as adults;

(2) by inserting a new subdivision (2) in subsection (b) to require that, at the time a patient or the patient’s surrogate decisionmaker is informed of the procedure governing review of a physician’s refusal to honor the patient’s advance directive or treatment decision or that of his/her surrogate decisionmaker, he/she must also be provided copies of the appropriate statement providing information about the ethics committee review process and the registry of health care providers and referral groups that have indicated a willingness to assist the patient or surrogate decisionmaker in locating and transferring the patient to a physician or facility willing to honor that treatment decision;

(3) by inserting the words “or the person responsible for the health care decisions of the patient” in subsection (e) to conform to the subchapter provisions relating to the authority of a surrogate decisionmaker to make health care treatment decisions for the patient and by inserting the words “has decided” and “has affirmed” to improve the syntax of the sentence; and

(4) by adding a new subsection (e-1) to provide that, when the ethics committee review process had been completed for a patient for whom the determination has been made that continuation of life-sustaining treatment is inappropriate, and the patient had been transferred to another facility but has returned to the same facility within six months of the decision and review process, a subsequent ethics committee review process is not necessary to comply with the provisions of the Act.

SECTION 6. The subchapter of the Act relating to “Directives to Physicians and Family” is amended by:

(1) adding a new Section 166.052 to set forth two alternative standard forms to be provided to patients or their surrogate decisionmakers upon request, which inform them of the applicable procedures in those circumstances in which there is a disagreement regarding the continuation of life-sustaining treatment, in both those circumstances in which the physician recommends against life-sustaining treatment that the patient wishes to continue and when the physician recommends the continuation of life-sustaining treatment that the patient does not wish to continue; and

(2) adding a new Section 166.053 to establish a voluntary registry to be maintained within the Texas Health Care Information Council to provide the identity and contact information of health care providers and referral groups indicating their willingness to accept the transfer of a patient and carry out a patient’s advance directive or health care treatment decision, with the registry to be posted on the Council’s Website accompanied by a disclaimer that neither the Council nor the State endorses or assumes any responsibility for any representation, claim, or act of any of the listed providers or referral groups.

SECTION 7. The subchapter of the Act relating to “Out-of-Hospital Do-Not-Resuscitate Orders” (Subchapter C) is amended to clarify that licensed nurses or other persons providing health care services may honor a physician’s “do-not-resuscitate” order in an out-of-hospital setting, such as a nursing facility or hospice in-patient facility, but emergency medical services personnel may honor only a properly completed, state “Out-of-Hospital Do-Not Resuscitate Order” or prescribed identification device in such

settings.

SECTION 8. The “definitions” section of the subchapter relating to “Out-of-Hospital Do-Not-Resuscitate Order” is amended by deleting the definition of the term “cardiopulmonary resuscitation” to conform to the SECTION 1 transfer of the definition of the term to the “definitions” section of Subchapter A of the Act.

SECTION 9. Effective Date. The Act will take immediate effect if it receives a two-thirds vote of all members of each house of the legislature or is otherwise to be effective September 1, 2003.